

DOCKET FILE COPY ORIGINAL

97-91

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

MAR 10 1997

In the Matter of)

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.

MM Docket No.
RM No.

Federal Communications Commission
Office of Secretary

Gainesville, Lewisville, Corsicana,
Robinson, Jacksboro and
Mineral Wells, Texas)

TO: Chief, Mass Media Bureau

MOTION TO DISMISS RULE MAKING PETITION FILED IN
CONTRAVENTION OF 47 C.F.R. § 1.420(d)
AND
MOTION TO STRIKE UNAUTHORIZED PLEADINGS

Jerry Snyder and Associates, Inc., ("Snyder"), licensee of KYXS-FM, Mineral Wells, Texas, by its attorneys, hereby respectfully submits its Motion to Strike the Comments of Heftel Broadcasting Corporation ("Heftel") dated February 27, 1997 ("the Comments") and the letter addressed to the Acting Secretary, also dated February 27, 1997 ("the Letter"), but in fact an unauthorized Motion "to defer action on Snyder's application." In regard thereto it is stated as follows:

I. Preliminary Statement

Since the basic predicate of Snyder's Motion to Dismiss is that Heftel's above-captioned Petition for Rulemaking must be dismissed as unacceptable in accordance with

the FCC's rules and well-established legal precedent, it follows that if this Motion is granted Heftel has no standing to request that the Acting Secretary¹ "defer action on Snyder's application" as requested in the Letter. Proper consideration of Snyder's Motion to Dismiss first requires a brief review of the chronology of the events in this proceeding.

II. Chronology

A) On February 13, 1996, the FCC issued a Notice of Proposed Rule Making (N.P.R.M.) in FM Allotments, Farmersville, Texas, 11 FCC Rcd 1790 (Chief, Allocations Branch 1996) ("Farmersville"). Therein, as in similar N.P.R.M.'s to change the FM table of allotments, the FCC set a comment date (April 5, 1996) and a reply comment date (April 22, 1996)

Thus, the Farmersville N.P.R.M. gave Heftel the notice required by Section 553(b), of the Administrative Procedure Act, (5 U.S.C. § 553(b)) that in order to establish legal standing as a "party" in Farmersville, any such party had to file either comments or a counterproposal on or before April 5, 1996.

B) By April 5, 1996 a number of parties had exercised their statutory right to obtain legal standing as a party in the Farmersville proceeding by timely filing counterproposals. Heftel was not one of them.

1) Thomas S. Desmond proposed the allotment of channel 260A to Blue Ridge, Texas.

¹ In fact, pursuant to 47 C.F.R. § 0.231(l) the sole authority delegated to the Secretary of the FCC is serve "as the official custodian of the Commission's documents..."

2) Hunt Broadcasting proposed, inter alia, to modify the license of KIKM, Sherman, Texas to channel 244C at Flower Mound, Texas

3) Greenville Broadcasting proposed the allotment of channel 260C3 to Greenville, Texas.

C) As a result of a settlement the Blue Ridge, Greenville and Farmersville, Texas allotment requests were withdrawn. This resulted in nine FM licenses eventually being modified in the Farmersville proceeding:

- 1) Station KIKM, channel 244A at Sherman, Texas was reallocated to channel 244C at Flower Mound, Texas
- 2) Station KBOC, channel 244A, Bridgeport, Texas was reallocated to channel 252A
- 3) Station KAIH had its permit to operate on channel 252A at Jacksboro, Texas modified to substitute channel 299A. The permittee of KAIH agreed to the new channel, a new transmitter site and the modification of its permit
- 4) Station KVMX operating on channel 244A at Eastland, Texas was reallocated to channel 236A
- 5) Station KMOO operating on channel 244A at Mincola, Texas was reallocated as channel 260A
- 6) Station KGRI operating on channel 260C3 at Henderson, Texas was reallocated on channel 262A at Tatum, Texas
- 7) Station KDDQ operating on channel 244A at Comanche, Texas was reallocated to channel 246A
- 8) Station KRXZ operating on channel 243A at Ardmore, Oklahoma was reallocated to channel 253A
- 9) Station KADA operating on channel 244A at Ada, Oklahoma was reallocated to channel 257A.

Hefel was aware of the existence of the Farmersville FM rule making proceeding when Hefel subsequently filed its petition for rulemaking, because Hefel filed two pleadings in which it made specific reference to that ongoing proceeding.

1) On July 26, 1996 Hefel filed the petition for rule making to modify the permit of KECS(FM), Gainesville, Texas and the license of KICI-FM, Corsicana, Texas) (the "H.P.R."). At Page 8 of the H.P.R., Hefel even while recognizing the existence of the ongoing Farmersville rulemaking proceeding submitted a further counterproposal to change the class A allocation at Jacksboro, Texas from channel 252A to 299A, to instead specify channel 237A rather than 299A. That, in turn required the change of the Mineral Wells allotment from channel 240C1 to channel 240C3. Despite the fact that Section 1.420(d) of the FCC's rules precluded such a late filed counterproposal in its petition Hefel did not even mention this legal barrier to FCC consideration of the H.P.R. Since at page 2 of the H.P.R. Hefel admitted that it had been working on the H.P.R. since April of 1995, there was obviously no reason why Hefel could not have timely filed the HPR by the April 5, 1996 cut-off date for filing counterproposals in the Farmersville proceeding

2) On July 29, 1996 Hefel filed another unauthorized pleading in the Farmersville proceeding entitled "Supplemental Comments" ("H.S.C."). 47 C.F.R. § 1.420 authorizes only the filing of comments and reply comments in FM rule making proceedings. Hefel had previously done neither so was not a party to that proceeding. At note 1 of the H.S.C. Hefel stated that: "Public notice of this counterproposal [i.e., to

change the Jacksboro allocation from channel 252A to channel 299A] was given on May 9, 1996 (Report No. 2130)."

D) On November 25, 1996 Snyder filed an application to modify the licensee of KYXS-FM to increase power to the C1 status already allocated to Mineral Wells. That application was accepted for filing on January 21, 1997 (Report No. 23912)

E) On February 27, 1997 Heftel filed yet another unauthorized pleading entitled "Comments of Heftel Broadcasting Corporation (C.H.B.C.)" in which Heftel argued that because it had filed its rule making petition on July 26, 1996 it precluded FCC consideration of Snyders minor modification application.

This motion is addressed to Heftel's legal argument in the C.H.B.C.

III. The Law

A) Heftel's rule making petition was unacceptable as a matter of law

As a matter of law the entire predicate of Heftel's legal argument in asserting priority over Snyder's minor modification application, stands or falls on whether Heftel's rule making petition was lawful and thus an acceptable filing. Heftel never addresses this basic question in the C.H.B.C.

It thus appears to be Heftel's position that it makes no difference whether Heftel's rule making petition was filed in violation of the legal requirements of 47 C.F.R. § 1.420 or not, because Heftel's petition still takes precedence over the FCC's processing of Snyder's lawfully filed application, merely because Heftel's filing was prior in time to Snyders, even if it was unacceptable.

Such a legal tenant would make a mockery of the Commission's rules. It would be analogous to a lawsuit in which the complainant asserted that he was entitled to claim victory in the New York Marathon simply because he had finished first, despite the fact that he had not entered into the race until the half way point. Under Heftel's argument it makes no difference whether Heftel filed a legally acceptable petition or not because the FCC must consider only the date that Heftel's rule making was filed and not whether it was filed in accordance with the FCC's rules and policies. That is not the law.

As the court of appeals has so often reminded us:

"[It] is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned,... for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those whom Congress has entrusted the regulatory missions of modern life"²

- B) For a rule making petition to be accepted by the FCC, there are certain prerequisites that the petitioner must meet.

In asserting that Heftel's petition for rule making takes precedent over Snyder's modification application Heftel relies exclusively on Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments, 7 FCC Rcd 4917 (1992) ("1992 Report and Order"). However, nowhere in the 1992 Report and Order does Heftel cite to anything that would support its proposition that it makes no difference whether Heftel's rule making petition was unacceptable because it violated numerous FCC

² *Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986).

rules. Rather, before Snyder's application, Heftel argues the only thing that matters is that Heftel filed before Snyder filed.

Note 13 of the 1992 Report and Order, states, in pertinent part: "Specifically, after a rule making petition to amend the FM Table of Allotments has been accepted..."

Clearly, the Commission did not intend that unacceptable rule making petitions are still to be given priority over subsequently filed acceptable applications for minor modification of existing FM licenses. Most significantly, Heftel fails to cite, Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments, 8 FCC Rcd 4743, 4745 ¶ 16 (1993) ("1993 Reconsideration Order") wherein the Commission stated: "Consistent with our current procedure, however, no proposals involving communities not already included in the proceeding can be introduced during the reply comment period as a method of resolving conflicts." Heftel knowing that the reply comment period in Farmersville expired on April 22, 1996 and the counterproposal to change the Jacksboro, Texas allotment from channel 252A to channel 299A had been placed on a public notice on May 9, 1996 (Report No. 2130), still filed its proposal on July 26, 1996 as a counterproposal to change the Jacksboro allotment in order to add the communities of Gainesville and Corsicana, Texas as part of the FCC's consideration of the Farmersville proceeding.

While in Farmersville, Report and Order, Chief, Allocations Branch, at note 7, released January 17, 1997 (DA 96-2210) the FCC ruled that Heftel's rule making petition was untimely, thus making this issue res judicata, the FCC did not simultaneously dismiss

Heftel's petition for violation of 47 C.F.R. §1.420(d). This omission necessitated the instant motion.

C) The Pinewood Standards were not met by Heftel

In FM Table: Pinewood, South Carolina, 5 FCC Rcd 7609 (1990) ("Pinewood") the Commission established a number of prerequisites to the acceptability of a petition to amend the FM table of allotments.

An untimely filed conflicting rule making petition to amend the FM table of allotments is unacceptable and must be dismissed. Pinewood at 7609, ¶ 7. Heftel filed precisely such an untimely conflicting petition in the Farmersville proceeding and now claims that this illegal act entitles Heftel to cut-off protection as against Snyder's lawful filing. It was precisely the alternative channels that the FCC found in the Farmersville proceeding were to be allotted to Jacksboro, Texas that precluded Heftel's subsequent inconsistent filing, but in Pinesville at 7610, ¶ 8 the FCC warned that in order to have consideration of its alternative proposal the party must file by the comment date. Heftel, despite considering the filing for almost a year did nothing until July 26, 1996, some three months later.

Finally, in Pinewood at 7610 ¶ 11, the Commission ruled: "[W]e believe it is not appropriate, after the counterproposal deadline, for a non-party to offer a new suggestion regarding a new community not previously at issue in the proceeding." However, despite the fact that it was "not appropriate" this is precisely what Heftel did in its Supplemental Comments filed on July 29, 1996, when it proposed the addition of Gainesville,

Corsicana and Mineral Wells to the FCC consideration of the Farmersville proceeding.

D) Other FCC rules violated by Heftel in this proceeding

Throughout this proceeding Heftel has shown total disregard for numerous FCC rules. For example,

1) When Heftel filed the H.P.R. on July 26, 1996 to change the table of allotments at Mineral Wells, Heftel did not serve Snyder until October 7, 1996. Despite the requirements of 47 C.F.R. § 1.401(d) See, FM Allotments, Brookville, PA, 3 FCC Rod 5555 ¶ 9 (Deputy Chief, Policy and Rules Division, 1988) (Pleadings filed in an allotment proceeding that do not comply with the requirements of Section 1.401 "will be deemed unacceptable and will not be considered." This omission did not stop Heftel from attesting in its petition that Snyder had no desire for the Class C1 allotment

2) The FCC has a policy set forth in FM Allotments: Columbus, Nebraska, 59 RR 2d 1185 (1986) against considering any rulemaking petition involving more than two substitutions of channels occupied by existing FM licensees. Farmersville required seven such substitutions. The whole success of the Farmersville proceeding depended on the licensee of KAIH agreeing to the substitution of channel 299A for channel 252A at Jacksboro, Texas. Yet despite this settlement, some months after reply comments in Farmersville were due, Heftel filed an unauthorized pleading entitled Supplemental Comments proposing yet three more substitutions.

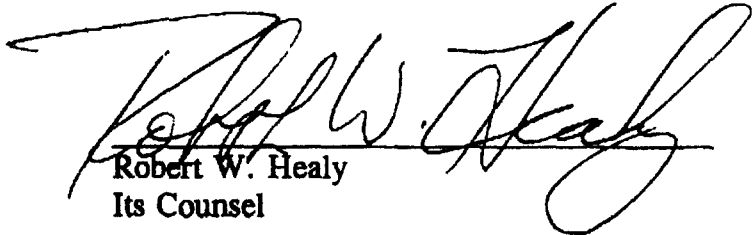
IV. Conclusion

By filing its Comments and the Letter, Heftel has put into issue a fundamental

legal question - Is a party that files a petition for rulemaking that is unacceptable, still entitled to claim cut-off protection as against subsequently filed application for minor modification of an FM license? Snyder respectfully submits that if Heftel's petition for rulemaking is not acceptable then as a matter of law the FCC has no choice under its rules but to dismiss Heftel's petition, which is its sole claim to standing to file the February 27, 1997 Comments and the Letter. If that petition is dismissed then Heftel's Comments and the Letter must be also dismissed. This would permit the FCC to process Snyder's minor modification application in due course.

Respectfully Submitted,

JERRY SNYDER & ASSOCIATES, INC.



Robert W. Healy
Its Counsel

Smithwick & Belendiuk
1990 M Street, NW
Suite 510
Washington, DC 20036

March 10, 1997

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law offices of Smithwick & Belendiuk, P.C., certify that on this 10th day of March, 1997, copies of the foregoing were mailed, postage prepaid, to the following:

Roy A. Russo, Esq.
Cohn & Marks
1333 New Hampshire Avenue, NW
Suite 600
Washington, DC 20036-1573

John A. Karousos, Chief*
Allocations Branch
Federal Communications Commission
2025 M Street, NW
Room 8322
Washington, DC 20554

Pamela Blumenthal, Esq.*
Federal Communications Commission
2025 M Street, NW
Room 8308
Washington, DC 20554


Lisa M. Balzer

* Hand Delivery